Nos. 17-1717, 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, MICHIGAN ASSOCIATION OF CHRISTIAN SCHOOLS, AND CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents three questions: (1) Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross. (2) Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), or some other test. (3) Whether, if the test from *Lemon* applies, the expenditure of funds for routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, American Association of Christian Schools, Michigan Association of Christian Schools, and Christian Educators Association International, submit this brief.[1]

Committed to Biblical principles and the values of the Judeo-Christian heritage, *Amici Curiae* hold a significant interest in the protection of constitutional rights, especially religious freedom (including a proper understanding of the First Amendment limits on the exercise of government power).

Most pertinent to the matter before this Court, *Amici Curiae* support the principle that unelected judges ought not deviate from the plain meaning of Constitutional provisions. *Amici Curiae* care deeply about the social and legal impact of politically-unaccountable judicial review that inappropriately changes the meaning of the Constitution. This is especially so when unelected judicial bodies invalidate state action because the action was informed by a moral purpose. *Amici Curiae* maintain that *Lemon* and its progeny extra-constitutionally permit changeable political preferences of unelected judges to substitute

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[1] Petitioners and Respondents granted blanket consent for the filing of *Amici Curiae* briefs in this matter. *Amici Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *Amici Curiae* brief.

their politically unaccountable will for politically accountable governance.

Amici Curiae hold special knowledge helpful to this Court about the importance of properly applying the plain meaning of Constitutional provisions like the Establishment Clause. *Amici Curiae* file this brief to encourage this Honorable Court to guide the American judiciary, and other branches of government, to return to a sound constitutional basis for state-church relations.

BACKGROUND

The Bladensburg WWI Memorial is a 40-foot-tall concrete Christian cross standing on a large pedestal. The American Legion's symbol is in the middle of the cross. The words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION" are inscribed at its base. The pedestal's large plaque, states the monument is "DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD." The plaque records the 49 local men who died in WWI, indicates dates of American involvement in the war, and quotes President Wilson's address to Congress requesting a declaration of war. *See generally*, Petitioner's Appendix 51a – 60a (*Am Humanist Assoc v. Maryland-Natl Capital Park and Planning Comm*, No. DKC 0550, Memorandum Op. (D.Md)).

Those challenging the war memorial cross contend that it violates the Establishment Clause. *See generally*, Brief in Opposition, *Am. Legion v. Am. Humanist Ass'n* (July 27, 2018) (Supremecourt.gov,

Docket No. 17-1717); Brief in Opposition, *Maryland-National Capital Park and Planning Comm'n v. Am. Humanist Ass'n* (Aug. 2, 2018) (Supremecourt.gov, Docket No. 18-18).

SUMMARY OF THE ARGUMENT

The war memorial cross does not violate the Establishment Clause. This Court should apply the plain meaning of the words in the Establishment Clause in its review of the government action here. The Establishment Clause simply prohibits federal laws "respecting an establishment of religion." U.S. Const. amend. I. The memorial cross does not establish a religion. It does not subject the American citizenry to governance under a theocracy. It does not coerce the American citizenry, by force of law and penalty, to practice an official religion. It does not, therefore, violate the plain meaning of the Establishment Clause.

Amici Curiae additionally urge this Court to overrule *Lemon v. Kurtzman*, 403 U.S. 602 (1971) because it unconstitutionally empowers unelected judges to supplant our politically accountable system of governance with their own protean preferences. *Lemon's* judicially contrived secular purpose and religious endorsement prohibition: 1) exceeds the scope of judicial power stated in Article III of the Constitution; 2) bypasses constitutionally required processes for amending the Constitution; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of innumerable U.S. citizens.

ARGUMENT

I. THE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

A. The Court Should Apply the Plain Meaning of the Words in the Establishment Clause to the War Memorial Cross.

The Constitution is not just a set of guidelines. It is the framework on which the government and our legal system are constructed. Its words both create this Court's authority and give it definition. Those words were written quite clearly, by highly qualified draftsmen, to express a simple meaning. Faithful adherence to those words is the touchstone for measuring the fulfillment of this Court's sacred duty. Every Justice who takes the oath of office swears to uphold the Constitution as it is written, not as he or she would like it to be written. Discerning and applying the meaning that the Drafters embodied in the Constitution's language is this Court's high calling. The alternative of making those words mean what contemporary judges think they should now mean is the first step on the path to tyranny.

Resolution of the issue before this Court requires a correct understanding of what the Establishment Clause means. This Court has long sought to honor this duty by understanding those meanings in their historical context. As Chief Justice Burger observed in *Marsh v. Chambers*, "historical evidence sheds light not

only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied...." 463 U.S. 783, 790 (1983). Reviewing the history of the Clause and its application, the *Marsh* Court held that a chaplain (employed by the government) did not violate the Establishment Clause by leading a legislature in prayer. *Id.* This Court in *Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014), thereafter noted that

> *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *County of Allegheny*, supra, at 670 (opinion of Kennedy, J.); see also *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers").

Similarly, in *Lee v. Weisman*, 505 U.S. 577, 631 (1992), Justice Scalia, joined by three other justices, stated that in this search for truth, "the meaning of the Clause is to be determined by reference to historical practices and understandings."

Webster's 1828 American Dictionary of the English Language defined *respecting* as "[r]egarding; having regard to; relating to,"[2] and *establishment* as "[t]he act of establishing, founding, ratifying or ordaining."[3] Thus, the plain meaning of the Establishment Clause is that government should not shackle the consciences of the people, for whose sake it exists, through a state religion. The experience of our Founders, which the Establishment Clause reflects and seeks to save us from, was aptly delineated by Justice Scalia, dissenting in *Weisman*, 505 U.S. at 640-41 (internal citations omitted):

> The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public

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[2] Noah Webster, *Am. Dictionary Of The English Language*, (1828), *at* http://websterdictionary1828.com/Dictionary/respecting, (*last visited* Dec. 13, 2018).

[3] Noah Webster, *Am. Dictionary Of The English Language*, (1828), *at* http://websterdictionary1828.com/Dictionary/establishment, (*last visited* Dec. 13, 2018).

support of Anglican ministers, and were taxed for the costs of building and repairing churches.

Numerous government actions supporting, acknowledging, and accommodating religion are considered time-honored practices that are a part of our nation's heritage. *See, e.g., Allegheny Co. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (Kennedy J., dissenting, joined by Rehnquist J., Scalia J., and White J.). Properly understood, the "separation of church and state is not a limitation on churches or religion; it is a limit on the role of government with respect to churches and religious life in general." Michael W. McConnell, *Religion and its Relation to Limited Government*, 34 Harv. J.L. & Pub. Pol. 943, 944 (2010).

The memorial cross does not violate the Establishment Clause because it was not an action regarding or relating to the act of establishing or founding of a religion or state church. The memorial cross does not subject the American citizenry to governance under a theocracy. Nor does it coerce the American citizenry, by force of law and penalty, to practice one official religion to the exclusion of all others. The memorial cross does not, therefore, violate the Establishment Clause.[4]

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[4] Under any test no First Amendment Establishment Clause violation exists. Here the relevant government action concerns highway safety. Moreover, various memorials about the cross clearly memorialize veterans. Additionally it is a matter of historical truth that for ninety years no challenge to the memorial cross occurred, until now. Indeed, the content, context, and history of the memorial cross unmistakably evidences, to any reasonable objective observer, that *memorializing* the fallen, not *endorsement* of Christianity, is the primary effect.

B. The Court Should Abandon the *Lemon* Test.

This Court's "religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." *Weisman,* 505 U.S. at 644 (Scalia, J., joined by three other Justices, dissenting). The test, often ignored but not yet overruled by this Court, regularly continues to receive "well-earned criticism." *Id.* at 644.

In *Lemon*, the Court replaced the test proscribed by the Constitution – whether government action "established" a religion – with a test of its own creation, whether government action had a secular purpose or "endorsed" religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The Court contrived a three-part test, and then mandated that government action must satisfy all three elements to comport with the Establishment Clause:

> First, the [government action] must have a secular [ ] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not foster an excessive government entanglement with religion.

Id. (internal citations omitted).

A few justices addressed the second prong of the *Lemon* test by requiring the government action to not even symbolically endorse religion. No agreement

existed though, even among those justices, on how to decide when a government action symbolically endorsed religion.[5]

The *Lemon* Court, in fashioning its test, ignored the plain meaning of the words in the Clause. When the Drafters wrote the Establishment Clause, they well knew the meanings of both "establish" and "endorse."

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[5] For example, Justice O'Connor, concurring in *Wallace v. Jaffree* stated:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. *** The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].

472 U.S. 38, 76 (1985).

Elsewhere she stated that: "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O'connor, J., concurring). Compare Justice O'Connor's measure with that of Justice Souter, who opined that he "attribute[s] these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis..., where I believe that such reasonable perceptions matter." *Id.* at 786. Likewise, Justice Stevens articulated a less informed "reasonable person" standard to determine whether an endorsement of religion exists when addressing the second prong in *Lemon*:

> If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.

Id. at 799.

They chose "establish" to express their intent. If they had meant "endorse," there is no doubt they would have used that word. They did not. The *Lemon* Court should not have altered the meaning of the Establishment Clause, and this Court should correct that error.

Remarkably, when determining the constitutionality of a government action under *Lemon*, the content of the government action is irrelevant. Instead, the *Lemon* test requires that a judge make a subjective assessment as to whether the government actor had a secular purpose (*i.e.*, the judge may indulge in relatively unconstrained speculation regarding another government official's state of mind, and subjectively conclude whether the government actor had a secular purpose). If the judge feels there was not a secular motive, the judge must hold that the government action violates the Establishment Clause.

Amici Curiae urge this Court to reverse *Lemon* because it extra-constitutionally permits changeable political preferences of unelected judges to substitute their politically unaccountable will for the politically accountable governance guaranteed by the Constitution.

As analyzed below, *Lemon's* "secular purpose" and "no symbolic endorsement" policies: 1) exceed the scope of judicial power granted in Article III of the Constitution; 2) bypass constitutionally required processes for amending the Constitution; 3) undermine the legitimacy of the judiciary; 4) create substantial unpredictability in the law; and 5) foster unjustifiable hostility toward the religious identity and dignity of numerous United States citizens.

1) Lemon Exceeds the Scope of the Judicial Power

Lemon's test exceeds the scope of judicial power stated in Article III of the Constitution. In pertinent part, Article III of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... (Section 1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.
> . . .

U.S. Const. art. III, § 2.

The *Lemon* Court conspicuously failed to identify any legitimate source of constitutional authority on which it relied when amending the meaning of the Establishment Clause. The simple reason the *Lemon* Court failed to do so is that no enumerated judicial power exists for the judiciary to amend the Constitution.

> The Federal Government "is acknowledged by all, to be one of enumerated powers." That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." The Constitution's express conferral of some powers

> makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 404-405 (1819)); U.S. Const. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 U.S. (1 Wheat.), 194-95 (1824).

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. (1 Cranch) 137 (1803).

The *Lemon* Court, venturing far beyond the scope of its Article III powers, improperly permits the political preferences of unelected judges to amend the Establishment Clause. *Lemon* rewrites "make no law respecting an establishment of religion" to instead require that "every government action have a secular purpose and not even symbolically endorse religion." All because a panel of unelected Justices preferred it so.

2) Lemon Bypasses Constitutionally Required Processes for Amending the Constitution

In amending the meaning of the words in the Establishment Clause, *Lemon* bypassed constitutionally required political processes that specifically require involvement of politically-accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .

U.S. Const. art. V.

Although the judicial branch may hold the power to say what the provisions of the Constitution mean, that power does not extend to amending or evolving the meaning of these provisions. That power is delegated to the politically accountable branches of government in Article V. Thus, when *Lemon* amended the meaning of the Establishment Clause, it usurped legislative authority contrary to the express provisions in Article V.

3) Lemon Undermines the Legitimacy of the Judiciary

When a court steps beyond its limited duty and usurps legislative authority, as the Court did in *Lemon*, it undermines good governance under the Rule of Law and its own legitimacy. To test the provisions of a government action against the Constitution is one thing; imposing a new meaning on the words of the

Constitution to achieve a judicially preferred outcome or social policy is another.

Those supporting *Lemon* wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to actively manipulate. They become Platonic Philosopher Kings, ruling by judicial fiat, unbound by the constraints of the Constitution's actual language. *Lemon* embeds this tyrannical principle in our constitutional jurisprudence by allowing judges to make subjective, ad hoc assessments as to whether a government actor had a secular purpose or motive.

In this case, Respondents contend the war memorial cross violates *Lemon's* distorted version of the Establishment Clause. They ask this Court to the uphold Fourth Circuit's subjective application of *Lemon's* judge-made doctrine banning government actions that might symbolically "endorse" religion.

Lemon's subjective test makes a litigant's success in judge-shopping the best indicator of whether a law will be struck down under the Establishment Clause. This Court should, therefore, overrule it.

If *Lemon's* judicially manufactured doctrine existed during the Lincoln Administration, the Emancipation Proclamation would be unconstitutional because Lincoln expressly invoked "the gracious favor of Almighty God" in the text of the proclamation.[6] And if

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[6] Abraham Lincoln, *Emancipation Proclamation*, (Jan. 1, 1863), https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html, (*last visited* Dec. 13, 2018).

Lemon's judicially manufactured doctrine applies to memorial crosses erected for those who died defending our freedom, then Arlington National Cemetery is also unconstitutional. Our nation was founded with numerous such symbols and has survived over two centuries of them, and there is undeniably no national religion that has been established by these practices.

4) Lemon Creates Substantial Unpredictability in the Law

The *Lemon* test also undermines predictability, a vital component of good governance under the Rule of Law. When it comes to judicial review of government action and the Establishment Clause, the subjective nature of the *Lemon* test produces inconsistent judicial precedents. This inconsistency is inevitable because judges utilizing *Lemon* make a personal subjective assessment as to whether they happen to believe a government actor had a secular motive or endorsed religion - rather than looking to the content of the government action itself. Inconsistent judicial precedents lead to unpredictability in the law. The inconsistent precedents produced by *Lemon's* subjectivist jurisprudence provide no useful guidance for government officials trying to act constitutionally.

To illustrate, compare two Establishment Clause cases handed down by this Court on the same day: *Van Orden v. Perry,* 545 U.S. 677 (2005) (upholding government action placing Ten Commandments on Government property as Constitutional) and *McCreary County v. ACLU,* 545 U.S. 844 (2005) (striking down government action placing Ten Commandments on government property as unconstitutional). Four justices would have upheld both. Four justices would

have struck down both. One justice upheld one and struck down the other -- applying *Lemon's* subjective standard, finding one symbolically endorsed religion and the other did not. *Compare also*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding baby Jesus in a manger as constitutional) and *Allegheny Co. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (striking down baby Jesus in a manger as unconstitutional).

If *Lemon* says the Ten Commandments are both constitutional and unconstitutional; if *Lemon* says displaying baby Jesus in a manger is both constitutional and unconstitutional, then no predictability exists for those seeking to conform their conduct to the law. It also reveals the absurdity of the doctrine and the potential for its abuse by a politically motivated judge or activist lawyer. Predictability in the law is a necessary component of good governance under the Rule of Law. *Lemon* replaces predictability in the law with the "evolving" political preferences of unelected judges.

5) Lemon Fosters Unjustifiable Hostility Toward Religious Identity

Finally, *Lemon's* judicially contrived test creates unjustifiable hostility toward the religious identity of numerous United States citizens. Many United States citizens seek guidance from their faith in formulating their public policy positions. Activist lawyers and politically motivated judges repeatedly use the *Lemon* doctrine to denigrate a person's religious identity. They do so by requiring religious people to substitute a purpose informed by their religious conscience for one founded on secular beliefs or traditions.

Requiring that every government action have a secular purpose, and not even symbolically endorse religion, is not only hostile toward a person's religious identity, it is an attempt to make that identity culturally, socially, and politically irrelevant. Proponents of this secular approach favor it because it enables judges to nullify unalienable rights. They assert that everyone can participate in important policy discussions except those whose identity is informed by religious viewpoints.

For example, in the State of Louisiana, Darwin's theory of evolution was taught in the government schools. Louisiana passed a law to also accommodate those with a different theory on the origin of the universe - creation science.[7] On its face, such an effort embodies the very essence of neutrality. The Court, however, reached an opposite conclusion in *Edwards v. Aguillard,* holding the law unconstitutional because it lacked a secular purpose and symbolically endorsed religious ideas. 482 U.S. 578, 583, 592 (1987).

According to *Lemon's* revisionist test, to be constitutionally "neutral," all laws and other government action must have a secular purpose and not even symbolically endorse religion.[8] Similarly, in *Epperson v. Arkansas,* the State of Arkansas passed a law regulating the teaching of evolution. 393 U.S. 97

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[7] The law prohibited the teaching of the theory of evolution in public schools unless accompanied by the instruction in creation science.

[8] For a scholarly discussion of how the neutrality principles demean religion in the United States, see G. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. Rev. 535, 566-572 (2004).

(1968). The Court began its analysis by declaring that "[g]overnment in our democracy . . . must be neutral . . . ." *Id.* at 103. The Court nevertheless proceeded to hold that because the law was motivated by a religious purpose, it violated the Establishment Clause.

Thus, although often couching its analysis in terms of neutrality, court decisions utilizing *Lemon* require secularly informed purposes while prohibiting religiously informed ones. Descriptive of such an analysis is Justice O'Connor's concurring opinion in *Wallace v. Jaffree*:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws ... It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

472 U.S. 38, 75-76 (1985).

It is apparently acceptable, and sufficiently neutral though, for government to dictate and endorse a secular belief or practice that all citizens do not share – even though the secular perspective necessarily implies a rejection of religious significance.

The implications of decisions like *Aguillard* and *Epperson* are immense. Mandating the irrelevance of religious identity and God enables judicial extermination of our unalienable liberty as viewed by the Framers.

Too many judges and other government authorities rely on *Lemon* to diminish religious identity and conscience. By way of example, senior citizens at a nursing home in Georgia were prohibited from praying before they ate their meal. The government said that because the meals were subsidized by the government, praying over the meal would be a violation of the Establishment Clause. Associated Press, *Georgia Seniors Told They Can't Pray Before Meals*, (May 10, 2010; updated Jan. 6, 2015), https://www.google.com/amp/s/www.foxnews.com/us/prayers-answered-seniors-can-pray-before-meals-at-georgia-center.amp (*last visited* Dec. 14, 2018).

Likewise, those whose actions are informed by the sacred rather than the secular have faced Establishment Clause challenges for: erecting the Ten Commandments, *McCreary County v. ACLU,* 545 U.S. 844 (2005); raising memorials for the fallen, *Am. Atheists, Inc v. Duncan*, 616 F.3d 1145 (10th Cir 2010), *Am. Humanist Ass'n v. Maryland-National Capital Park and Planning Comm'n.,* No.15-2597, slip op. (4th Cir. Oct. 18, 2017); engaging in a moment of silence prior to starting school, *Wallace v. Jaffree,* 472 U.S. 38 (1985); praying prior to football games, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); and for displaying a manger scene at Christmas time, *Allegheny Co. v. Greater Pittsburgh ACLU,* 492 U.S. 573 (1989).

Several Justices have recognized how, contrary to the plain meaning of the Establishment Clause, *Lemon's* judicially contrived test creates unjustifiable hostility toward the religious identity of numerous United States citizens:

Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage . . . . Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society [citation omitted]. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious . . . .

When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

* * *

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Allegheny, 492 U.S. at 657-659 (Kennedy, J., joined by Rehnquist, Scalia, and White, J., dissenting). These Justices correctly recognized that *Lemon's* "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.* at 655.

For some legislators who view the world through their religious identity, God and his Word are real, and therefore really matter. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015). It is part of who they are. They understandably oppose devolutionary social engineering that threatens the health, safety, and morals of the nation, as viewed through their religious identity. The government *Lemon* envisions must shape public policy informed by secular dogma, without regard to any religious conscience or moral considerations. In such a government, wisdom derived from religious tradition or individual conscience informed thereby has no place. Under our Constitution legislators should not have to choose between fidelity to their religious identity or participating in the policymaking process. The *Lemon* test demands that they do so, invalidating any policy they make that is informed by their religious identity. Thus, the *Lemon* test deprives people of faith of their dignity by telling them that reliance on their faith while serving in government is unconstitutional.

Prohibiting a policy simply because it is informed by ancient sacred tenets prevents thousands of years of wisdom from informing the public ethic. The idea that God created humans in His image, and that all human life has dignity, ended slavery and advanced the rights of women around the world. Conversely, when

government suppresses religious identity and the free expression of religious ideals, it often results in tragic consequences. Secularists such as Stalin murdered over 42 million people. Mao Zedong murdered over 37 million. Hitler murdered over 20 million. And the list of atrocities goes on and on where those in power selectively pick and choose which citizen's identities it will arbitrarily censure.

We are, therefore, in the midst of a high-stakes battle over the character of the American nation. The extent to which *Lemon's* jurisprudence prevails over the view that the plain meaning of a constitutional provision governs will determine: 1) whether unalienable truth, as envisioned in the Declaration of Independence, will continue to be relevant as an objective limit on government action; and 2) whether the judiciary replaces the Framers' intent with its own personal social policy views.

Institutional integrity cannot exist without personal virtue. Good governance and civic institutional integrity rest on the virtue of those holding power within those institutions. Ideas grounded in one's religious identity support and nurture this virtue and should, therefore, always be permitted within the marketplace of ideas and the policymaking process. The *Lemon* test precludes great ideas grounded in one's religious identity from entering the policymaking process. People of faith should not be stripped of their dignity, religious identity, and conscience in order to serve in our constitutional republic. That certainly was not the Framers' vision.

In summary, judicial crafting of a subjective three-prong "secular purpose" test defining the

Establishment Clause: 1) exceeds the scope of Article III; 2) bypasses constitutionally required processes for amending the constitution; 3) undercuts the legitimacy of the judicial power; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous U.S. citizens. This Court should, therefore, overrule *Lemon* and no longer apply its "secular purpose / no religious endorsement" test to government action.

CONCLUSION

Because the cross was not a law establishing a national religion, the cross did not violate the plain meaning of the Establishment Clause of the First Amendment. This Honorable Court should, therefore, reverse the decision of the appellate court.

It is hubris to deny our heritage. The men and women who fought in World War I offered up their lives to preserve the values of liberty, equality, freedom of speech, and freedom of religion. We enjoy those blessings because of their sacrifice. Our debt to them is too vast to be repaid.

Their fellow citizens chose to honor them and the values they served with a memorial in the shape of a cross, as was their tradition. It was a sign of the high honor the living believed that the fallen had earned. In fact, they knew no higher form of honor than the symbol of Christ's sacrifice. We, too, should honor the choices our forebears made – the choices they made to serve and the choices they made to honor such service. Whether we agree with all of their choices is not the issue. They suffered through that time of sacrifice.

Their survivors rebuilt the nation we now enjoy. They have earned our respect. Both their sacrifices and their choices about memorializing their deeds are our legacy. To deny either of those is to deny who we are – to believe we can make ourselves *ex nihilo*. It is hubris.

If some see the memorial as an endorsement of the values of valor and patriotism, so be it. If some see it as an endorsement of sacrificial love, so be it. And if some see it, in part, as an endorsement of the greatest sacrifice of love that stands at the center of human history, so be it. It establishes no religion, and neither the Founders of this Nation nor the Framers of its Constitution would ever say that it did. They would surely commend those who erected the memorial as true Americans, and so should we.

Respectfully submitted,

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